



STATE OF INDIANA  
ALCOHOL AND TOBACCO COMMISSION

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Greendale Food Mart, Inc. )  
d/b/a Greendale Food Mart )  
498 Ridge Ave. ) Permit #DL15-14174  
Lawrenceburg IN 47025 )

PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

I  
BACKGROUND OF THE CASE

Greendale Food Mart, Inc., d/b/a Greendale Food Mart, 498 Ridge Ave., Lawrenceburg, Indiana 47025 ("Permittee") is the holder of an Alcohol and Tobacco Commission permit type 115, permit #DL15-14174. The Permittee is charged with the following violations occurring on January 19, 2010:

Furnishing alcohol beverage to minor, Indiana Code 7.1-5-7-8

The hearing on the merits was conducted before Hearing Judge E. Edward Dunsmore on July 9, 2010. The Alcohol and Tobacco Commission ("Commission") was represented by the Prosecutor, Jennifer D. Drewry. The Permittee appeared pro se by Christopher Libbert, owner. Witnesses were sworn, evidence was heard, the parties presented final arguments and the matter was taken under advisement. Hearing Judge E. Edward Dunsmore, having reviewed the tape-recorded transcript of the hearing, the evidence submitted to the Commission at the hearing and the contents of the entire file, now tenders his Proposed Findings of Fact and Conclusions of Law for recommendation to members of the Commission.

II  
EVIDENCE SUBMITTED BEFORE THE COMMISSION

The following exhibits were introduced by the Prosecutor against the Permittee in this cause:

1. The contents of the entire Commission file ("ATC file").
2. Indiana State Excise Police Citation Report, regarding an incident occurring on January 19, 2010, at Greendale Food Mart, Lawrenceburg, IN.
3. Copy of Indiana Excise Police Report of Permit Visit and Evaluation issued to Greendale Food Mart, Inc., d/b/a Greendale Food Mart, for Furnishing Alcoholic Beverages to a Minor in violation of IC 7.1-5-7-8, regarding an incident occurring on January 19, 2010, at the Greendale Food Mart in Lawrenceburg, IN.
4. One copy of a photograph of a youth known as Minor John IU#30045, DOB 6/5/1991.

The following exhibits were introduced by the Permittee on behalf of the Permittee in this cause:

1. General Affidavit of Joseph P. Labazzo.
2. Indiana State Excise Police news release consisting of two pages.
3. Non-compliance rate for calendar year 2009 compiled by the Indiana State Excise Police.

The following individuals testified on behalf of the Prosecutor against the Permittee in this cause:

1. Indiana Excise Police Officer Charles Peters
2. Indiana Excise Police Officer Travis Thickstun
3. A youth known as Minor John IU #30045, DOB 6/5/1991

The following individuals testified on behalf of the Permittee in this cause:

1. Christopher Libbert, stockholder/ owner

### III FINDINGS OF FACT

1. The Permittee, Greendale Food Mart, Inc., d/b/a Greendale Food Mart, 498 Ridge Ave., Lawrenceburg, Indiana 47025, is the holder of a type 115 permit, permit #DL15-14174 (ATC file).
2. Greendale Food Mart, Inc. is the owner of Greendale Food Mart. Christopher Libbert is a stockholder of Permittee. (Permit Violation Hearing, ATC file).
3. On Tuesday, January 19, 2010, at approximately 8:00 p.m., Indiana Excise Police Officers Charles Peters and Travis Thickstun conducted a random, unannounced inspection at Greendale Food Mart, 498 Ridge Ave. Lawrenceburg, IN, pursuant to IC 7.1-5-7-16 and IC 7.1-5-7-17. These inspections are commonly known as Survey of Alcohol Compliance ("SAC") checks. (Permit Violation Hearing; ATC file).
4. Officer Peters and a minor, known as John IU # 30045, DOB 6/5/1991 ("John"), conducted a SAC check at Greendale Food Mart in Lawrenceburg, Indiana. (Permit Violation Hearing; ATC file).
5. On January 19, 2010, at approximately 8:00 p.m., John and Officer Peters (in plain clothes) entered Greendale Food Mart in unidentified capacities. (ATC file; Permit Violation Hearing)
6. While inside Greendale Food Mart John walked to the beer aisle and removed a 6 pack of Natural Light beer from the shelf and carried it to the checkout. John then placed the beer on the counter. The clerk, later identified as Christopher Libbert (owner), rang up the sale of the beer totaling \$4.38. John paid for the beer and exited the store. Officer Peters exited the store a short time later. (ATC file; Permit Violation Hearing)
7. At no time while inside the permit premises was John asked his age, date of birth, or for identification. (Permit Violation Hearing; ATC file)
8. At approximately 8:37 pm, Officers Thickstun and Peters returned to the business location. Mr. Libbert was still on duty. Officer Peters approached him and identified Officer Thickstun and himself as Indiana State Excise Police officers both verbally and by display of badges. Mr. Libbert was advised that he had failed a SAC check conducted earlier that evening. Officer Peters then showed him a photograph of minor John and advised Mr. Libbert that John was 18 years old and that he had purchased a 6 pack of Natural Light beer without having been asked his age, date of birth, or to produce identification. Officer Peters then completed a Notice of Violation and explained the violation to Libbert. Owner Libbert signed and received a copy of the Notice of Violation charge of: Sale of alcoholic beverage to a minor, Indiana Code 7.1-5-7-8. (Permit Violation Hearing; ATC file).
9. Owner Libbert testified that Officer Peters and minor John had been in the store twice that evening before the permit violation citation was issued, and that he had called a neighbor to tell the neighbor that he (Libbert) was concerned about his (Libbert's) personal safety. Libbert testified that he believed he was being looked at for a robbery attempt. Owner Libbert introduced an affidavit from a Joseph Labazzo stating these facts. (Permit Violation Hearing; ATC File)

10. Owner Libbert believes he did not check John's identification because he was concerned about his safety and was distracted. (Permit Violation Hearing)
11. Any finding of fact of fact may be considered a conclusion of law if the context so warrants.

IV  
CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these proceedings and over this permittee. Indiana Code 7.1-3-19-1; Indiana Code 7.1-3-23-2.
2. The definition of a permittee includes an agent, a servant, or other person acting on behalf of a permittee, whenever a permittee is prohibited from doing an act under this title. Indiana Code 7.1-1-3-30(b).
3. Christopher Libbert (stockholder/clerk/owner) was an agent or other person acting on behalf of a permittee, namely, Greendale Food Mart Inc., d/b/a Greendale Food Mart. Indiana Code 7.1-1-3-30(b).
4. A minor means a person less than 21 years of age. Indiana Code 7.1-1-3-25.
5. It is unlawful for a person to recklessly, knowingly or intentionally sell, barter, exchange, provide or furnish an alcoholic beverage to a minor. Indiana Code 7.1-5-7-8.
6. Defenses to furnishing alcohol are provided in Indiana Code 7.1-5-7-5.1.
7. The burden of proof rests upon the permittee (seller) to establish the defense provided in Indiana Code 7.1-5-7-5.1; *Mulread v. State*, 7 N.E. 884 (Ind. 1886); *Fehn v. The State*, 29 N.E. 1137 (Ind.App.1892).
8. The permittee, Greendale Food Mart, Inc., d/b/a Greendale Food Mart, by virtue of its relationship with Christopher Libbert, is guilty of the violation of sale of alcoholic beverage(s) to a minor. Indiana Code 7.1-5-7-8.
9. The weight of the evidence and burden of proof do not sustain any of the defenses to unlawfully furnishing alcohol to a minor and allowing a minor to loiter as provided for in IC 7.1-5-7-5.1.
10. The permittee, Greendale Food Mart, Inc., d/b/a Greendale Food Mart, is guilty of sale of alcoholic beverage(s) to a minor pursuant to Indiana Code 7.1-5-7-8.
11. Any conclusion of law may be considered a finding of fact of the context so warrants.

V.  
ADDITIONAL FINDINGS OF FACT

1. On August 3, 2010, Permittee, by Christopher J. Libbert, submitted *Objections to Proposed Findings of Fact and Conclusions of Law*, ostensibly pursuant to 905 IAC 1-36-9, even though the Findings of Fact and Conclusions of Law entered herein were so entered pursuant to 905 IAC 1-37-12. (ATC File)
2. Permittee maintains that it is pleading the defense of entrapment as defined by IC 35-1-41-9 and pursuant to the holding in *Baird v. State*, 446 N.E.2d 446 (Ind. 1983). (ATC File)

VI.  
ADDITIONAL CONCLUSIONS OF LAW

1. IC 35-41-3-9 as read in conjunction with and held by *Baird v. State, supra*, stands for the proposition that in order to rebut the defense of entrapment the state must show two things: first, that the level of police activity was not such that it would persuasively affect the free will of the accused, and second, that the accused was predisposed to commit the offense. Part (b) of the statute, relating to merely affording the accused the opportunity to commit the crime charged does not negate the necessary element of predisposition. *Baird v. State, supra, at p. 344.*
2. In 2008 the Indiana legislature passed IC 7.1-5-7-16 and IC 7.1-5-7-17 specifically allowing for random, unannounced inspections of locations where alcoholic beverages are sold, or distributed, to ensure compliance with Title 7.1 of the Indiana Code. These statutes further provided that “*Notwithstanding any other law*” that a law enforcement officer may engage a person at least eighteen (18) and less than twenty-one (21) years of age to receive or purchase alcoholic beverages as part of the enforcement action allowed under IC 7.1-5-7-16 and IC 7.1-5-7-17. Indiana Code 7.1-5-7-16 and Indiana Code 7.1-5-7-18
3. IC. 35-41-3-9 does not apply to civil enforcement matters, but rather functions to provide a defense against criminal liability, not civil liability. *Berntson v Indiana Div. of Family & Children, 737 N.E.2d 1208 (Ind. App.2000)*
4. The defense of entrapment is a question for the trier of fact. *Webb v. State, 575 N.E.2d 1066 (Ind. App.1991)*
5. The Permittee in this action was not charged criminally by the State of Indiana, but rather was administratively cited for a violation of Title 7.1 of the Indiana Code as an enforcement action pursuant to IC 7.1-5-7-16 and IC 7.1-5-7-17.
6. The Prosecutor of the Alcohol and Tobacco Commission is a statutorily created office with the power and duty to, *inter alia*, “prosecute before the commission all violations of laws pertaining to alcohol, alcoholic beverages.....” IC 7.1-2-2-5(a)
7. Title 7.1 does not give either the commission or the prosecutor authority to prosecute and hear Title 7.1 violations as criminal offenses. In order for a Title 7.1 offense to be prosecuted as a criminal offense, the charging enforcement officer would necessarily have to charge a permittee in a court of general criminal jurisdiction. The commission’s powers of enforcement are limited to those contained in IC7.1-2-3-1*et.seq.*
8. Any additional finding of fact herein may be considered an additional conclusion of law, if the context so warrants.
9. Any addition conclusion of law herein may be considered an additional finding of fact, if the context so warrants.

WHEREFORE, the Hearing Judge determines from the presentation and review of the evidence, the burden of proof and a determination of the credibility of the witnesses that the Prosecution HAS PROVEN that the Greendale Food Mart, Inc., d/b/a Greendale Food Mart, has violated the following statute:

Sale of alcoholic beverage(s) to minor(s), in violation of Indiana Code 7.1-5-7-8

WHEREFORE, the Hearing Judge recommends the following disposition to the Commission:

Fine in the amount of five hundred (\$500.00), to be paid within 30 days of final approval of these Findings of Fact and Conclusions of law by the Commission.

Dated: \_\_\_\_\_

\_\_\_\_\_  
E. Edward Dunsmore Hearing Judge  
Alcohol and Tobacco Commission